

Bulgarian Telecoms Giant Vivacom – given a new lease of life by English scheme

NEF Telecom Company B.V. (a Dutch company) and Bulgarian Telecommunications Company AD (a Bulgarian company) which form part of the Vivacom group (the "BTC Companies") join a growing list of foreign companies which have utilised an English law scheme of arrangement as part of its €1.7bn corporate restructuring. Following on from other cases such as Rodenstock and Primacom, this judgment provides another example of a situation where foreign borrowers with English law governed finance documents have opted to use a scheme of arrangement to restructure their debts.

On 6 September 2012, the High Court sanctioned the schemes of arrangement for companies incorporated in the Netherlands and Bulgaria. This case reconfirms the significance attached to the governing law clause and the granting of exclusive jurisdiction to the English courts in finance documents in order to establish a "sufficient connection" with the jurisdiction for the purposes of implementing a scheme.

Philip Hertz, joint leader of Clifford Chance's restructuring and insolvency group comments: "*This case represents the latest in a string of restructurings utilising an English law technique for foreign companies. In the current economic climate, the English law scheme of arrangement provides an invaluable tool allowing over-leveraged companies to restructure their balance sheet where*

insolvency is looming or other attempts to restructure the company have proved unsuccessful. Our team here at Clifford Chance has been instrumental in pushing the boundaries on the use of schemes for restructuring foreign businesses, and we were delighted to have been involved with these latest schemes for companies in the Vivacom group."

Background

Bulgarian Telecommunications Company AD is the second largest telecommunications company in Bulgaria and is partially listed on the Bulgarian stock exchange. The restructuring implemented, in part by the schemes, was developed following a series of attempts over a two year period, to either sell the group or implement an alternative restructuring. The restructuring completed in November this year. The

Key issues

- English court exercises jurisdiction to sanction scheme of a Dutch and Bulgarian company
- English law governed debt and exclusive jurisdiction clause is enough for sufficient connection test
- Court avoids the need to make a definitive judgment on the application of the Judgments Regulation

decline in the total market revenues in the telecommunications sector in Bulgaria meant that the implementation of the schemes of arrangement of the Vivacom group was considered to be the only realistic and achievable alternative to the

formal insolvency of the Vivacom group and as such it was supported by the overwhelming majority of scheme creditors at the scheme meetings.

The restructuring now implemented (of which the schemes formed a key part) employed a structure that is commonly used for over-leveraged groups of companies, including:

- a controlled acceleration and enforcement of a Bulgarian law governed share pledge and the transfer of the shares to a new special purpose vehicle ("SPV") (controlled by the purchasing entity – a consortium of existing lenders and a Russian and a Bulgarian bank);
- the payment of cash consideration by the purchaser in exchange for a number of shares in the SPV;
- a debt write-down by existing lenders; and
- the promotion of the schemes to effect the restructuring of the liabilities under the existing facilities.

Jurisdiction to sanction the schemes

At the sanction hearing in relation to the schemes, the judge was required to consider whether the Council Regulation 44/2001 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters (the "Judgments Regulation") fettered his jurisdiction to sanction the proposed schemes.

This case re-opened many of the issues relating to an English court's ability to accept jurisdiction to sanction a scheme of arrangement in respect of a company incorporated in another EC Member State that has its

'Centre of Main Interests' in that Member State. In particular, the issue as to whether either the Judgments Regulation or the EC Regulation on Insolvency Proceedings has narrowed the scope of the meaning of the phrase '*liable to be wound up under the Insolvency Act 1986*' (within the meaning of section 895(2)(b) of the Companies Act 2006).

The judge said that he tended towards the view that schemes of arrangement were unlikely to be within the intended scope of Article 2 of the Judgments Regulation. This essentially provides for a defendant to be sued in the Member State where they are domiciled, as in the case of a scheme there was no "defendant" (noting, however, that he could see an argument that where a creditor exercised its right to appear at a sanction hearing to oppose the scheme, such creditor might fall within the ambit of "defendant"). The judge went on to say that even if the schemes did fall within Article 2 of the Judgments Regulation, this Article could be disapplied pursuant to certain other provisions contained within the Judgments Regulation.

Sufficient Connection

The judge was satisfied that the Court should exercise its discretion to sanction the schemes on the basis that English law governed the lending relationship between the scheme creditors and the BTC Companies under the existing facilities agreements (with the relative rights of the scheme creditors under those lending arrangements governed by an intercreditor agreement which was also governed by English law and subject to the exclusive jurisdiction of the courts in England and Wales).

Scheme formalities and merits

The judge confirmed that the scheme formalities had been satisfied in this case, in particular that the requisite voting majorities had been achieved and that the scheme was fair and reasonable. It was noteworthy that a successful restructuring implemented by the schemes for the Vivacom group would avoid any formal insolvency processes in the Netherlands and Bulgaria, respectively.

Expert reports were also submitted to the Court, each of which supported the findings that there was a reasonable prospect that the schemes should be recognised and given effect in Bulgaria and the Netherlands.

Each of the schemes was opposed by a single creditor at both the convening hearing and the sanction hearing (appearing not by counsel but in person via an employee). The objections were ultimately unsuccessful but allowed for some measure of adversarial argument before the court which resulted in a fully reasoned decision.

Conclusion

From both a legal and commercial perspective, this case is another example of the English court's willingness to exercise its jurisdiction over foreign companies to facilitate a restructuring. Schemes continue to offer a viable solution to businesses that need their debt burden to be "right-sized". This case highlights one of the key benefits to lenders and borrowers alike, where finance documents are governed by English law and disputes are subject to the exclusive jurisdiction of the English

courts, where these provisions may allow foreign companies to make use of a scheme of arrangement. A scheme provides a further restructuring option in addition to those techniques that may be available in the home jurisdiction, this may be crucial in circumstances where there may simply not be anything as versatile as a scheme of arrangement.

Clifford Chance LLP act on behalf of the Steering Committee of syndicated lenders in this case.

What is a scheme of arrangement?

- A creditors' scheme of arrangement is a statutory contract or arrangement between a company and its creditors (or any class of them) made pursuant to the Companies Act 2006. It is not an insolvency proceeding but can be implemented in conjunction with formal insolvency proceedings, such as administration or liquidation or on a standalone basis. The scheme becomes legally binding on the company and such creditors (or any class of them) if:
 - a majority in number representing not less than three-fourths in value of creditors (or any class of them) present and voting in person or by proxy at meetings summoned pursuant to an order of the court, vote in favour of the scheme;
 - the scheme is sanctioned by a further order of the court after the creditors' meetings; and
 - an office copy of the order sanctioning the scheme is delivered to the Registrar of Companies for registration.
- If the requisite majorities set out above are obtained, the scheme will bind all the relevant company's creditors as at the date of the scheme (or the relevant class or classes of them) whether they were notified of the scheme and/or whether they voted in favour of the scheme or not. Notwithstanding this, the court will need to be satisfied that every effort has been made to contact all creditors.
- A scheme provides a useful mechanism for: (i) overcoming the impossibility or impracticality of obtaining the individual consent of every creditor to be bound to a proposed course of action; and (ii) for preventing, in appropriate circumstances, a minority of creditors from frustrating what is otherwise in the interests of a company's creditors generally (where, for example, the alternative is an insolvency process which may destroy value).

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